accused or to direct the jury to do so, notwithstanding that he is guilty of the offence.

And again at p 437:

... for the fairness of a trial according to law is not all one-sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted. However much the judge may dislike the way in which a particular piece of evidence was obtained before proceedings were commenced, if it is admissible evidence probative of the accused's guilt it is no part of his judicial function to exclude it for this reason. If your Lordships so hold you will be reverting to the law as it was laid down by Lord Moulton in *Rex* v *Christie* [1914] AC 545, Lord du Parcq in *Noor Mohamed* v *The King* [1949] AC 182 and Viscount Simon in *Harris* v *Director of Public Prosecutions* [1952] AC 694 before the growth of what I believe to have been a misunderstanding of Lord Goddard's dictum in *Kurma* v *The Queen* [1955] AC 197.

I would accordingly answer the question certified in terms which have been suggested by my noble and learned friend, Viscount Dilhorne, in the course of our deliberations on this case. (1) A trial judge in a criminal trial has always a discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative value. (2) Save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after commission of the offence, he has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means. The court is not concerned with how it was obtained. It is no ground for the exercise of discretion to exclude that the evidence was obtained as the result of the activities of an agent provocateur. I would dismiss this appeal.

Lord Salmon said at p 443:

My Lords, it is now well settled that the defence called entrapment does not exist in English law: *Reg* v *McEvilly* 60 Cr App R 150; *Reg* v *Mealey* 60 Cr App R 59. A man who intends to commit a crime and actually commits it is guilty of the offence whether or not he has been persuaded or induced to commit it, no matter by whom. This being the law, it is inconceivable that, in such circumstances, the judge could have a discretion to prevent the Crown from adducing evidence of the accused's guilt — for this would amount to giving the judge the power of changing or disregarding the law. It would moreover be seriously detrimental to public safety and to law and order, if in such circumstances, the law immunized an accused from conviction. There are, however, circumstances in which an accused's punishment in such a case might be mitigated, and sometimes greatly mitigated.

The observations of the Law Lords that the defences of agent provocateur and entrapment do not exist in English law would also reflect the position in Singapore. It is not the province of the court to consider whether the CNB should have proceeded about its work in one way or the other. The court can only be concerned with the evidence before it. On the evidence before it in the present case, a conviction on any other charge would not have been appropriate; and on a conviction for the offence for which the appellant was charged, the death sentence was mandatory.

Accordingly, we dismissed the appeal.

Appeal dismissed.

Solicitors: *Edward D' Souza & Co.*

Reported by *Zarinah Marican*

Ooi Han Sun & Anor v Bee Hua Meng

HIGH COURT (SINGAPORE) — SUIT NO 6412 OF 1985
YONG PUNG HOW CJ
30 MAY 1991

Tort — Res ipsa loquitur — Burden of proof — Road accident — Defendant having control of motor vehicle — Victim a passenger — Shifting of burden

Tort — Damages — Plaintiff working illegally in Singapore — 'Ex turpi causa non oritur actio' does not apply in tort to give a good defence — Public policy will not allow plaintiff to be compensated for loss of earnings based on wages arising from working illegally in Singapore — Loss of earnings to be based on earnings in Malaysia

Tort — Damages — Loss of dependency — Possibility of widow remarrying — Rare occurrence among Asian widows

Tort — Damages — Damages in foreign currency — Discretion of court — Tort committed in Singapore — Victim a Malaysian

Evidence — Witness interested party — Witness remembering incident after a break of several years — Reliability of such evidence

The first plaintiff and the deceased were passengers in a motor pick-up driven by the defendant when the said pick-up overturned. At the time of the accident the first plaintiff and the deceased were in the employ of the owner of the motor pick-up and were being driven to work. The first plaintiff was a Malaysian and at the time of the accident had not been issued with a work permit. The deceased was a Singaporean and his claim was brought by his administratrices, the second plaintiffs.

Held, allowing both claims:

(1) Although the plaintiffs were unable to discharge the burden of proof placed on them by proving the defendant's negligence, the mere fact that the accident happened spoke for itself and, in applying the maxim res ipsa loquitur, the court could draw an inference of negligence against the defendant so as to establish a prima facie case against him.

(2) The pick-up was at all times under the control of the defendant. The accident could not have occurred without his negligence. A burden was therefore cast upon him, and he must rebut the inference of negligence raised against him.

(3) Where a witness was recalling events that took place after many years, the court must bear in mind that the memories would have blurred with the long passage of time. The unreliability of such evidence was greater when the witness was an interested party in the proceedings.

(4) The court did not accept the defendant's version of the accident and found further that the defendant had failed to discharge the burden placed on him. The defendant was found to be solely to blame for the accident.

(5) The maxim *ex turpi causa non oritur actio* had a very limited application in tort and in general. The fact that the first plaintiff was involved in some wrongdoing did not of itself provide the defendant with a good defence. It was also the public policy in Singapore that a claim will not be defeated by reason of the fault of the person suffering the damage. The first plaintiff not having a work permit would not therefore prevent him claiming damages from the defendant.

(6) The first plaintiff could not, however, be compensated for on the basis of what he might have earned by working illegally in Singapore. This would be against public policy. His loss of earnings should be based on an estimate of what he would have earned in Malaysia, had there been no accident.

(7) As damages were being awarded for a tort committed in Singapore, the usual practice of awarding damages in Singapore dollars was adopted.

(8) In assessing the loss of dependency to the deceased's widow, the court discarded the possibility that the widow might remarry because she had not remarried in the eight years since the accident and because the remarriage of Asian widows was a rare occurrence.

Cases referred to

1 *Scott* v *St Katherine Docks Co* (1865) 3 H & C 596; 159 ER 665 (follid)
2 *VVV Menon* v *Henri Pigeonneau* [1957] MLJ 25 (follid)
3 *Halijah* v *Velaitham* [1966] 1 MLJ 192 (follid)
4 *Mace* v *R & H Green and Silley Weir Ltd & Anor* [1959] 2 WLR 504; [1959] 1 All ER 655 (follid)
5 *British Transport Commission* v *Gourley* [1955] 3 All ER 796 (follid)
6 *Henwood* v *Municipal Tramways Trust (SA)* (1938) 60 CLR 438 (follid)
7 *National Coal Board* v *England* [1954] AC 403; [1954] 1 All ER 546 (follid)
8 *Progress and Properties Ltd* v *Craft* (1976) 12 ALR 59 (follid)
9 *Jackson* v *Harrison* (1978) 19 ALR 129 (follid)
10 *Godbolt* v *Fittock* (1963) 63 SR (NSW) 617; [1964] NSWR 22 (refd)
11 *Smith* v *Jenkins* (1970) 44 ALJR 78 (refd)
12 *Ashton* v *Turner* [1981] QB 137; [1980] 3 All ER 870 (follid)
13 *Pitts* v *Hunt & Anor* [1990] 3 All ER 344 (follid)
14 *Kang Bark Teng & Anor* v *Lee Kwee Lim & Anor* [1952] MLJ 27 (refd)
15 *Tan Chooi Thin & Anor* v *Teo Whee Hong* [1953] MLJ 203 (refd)
16 *Yaakub Foong* v *Lai Mun Keong & Ors* [1986] 2 MLJ 317 (refd)
17 *Meadows* v *Ferguson* [1961] VR 594 (refd)
18 *Burns* v *Edman* [1970] 2 QB 54; [1970] 1 All ER 886 (refd)
19 *LeBagge* v *Buses Ltd* [1958] NZLR 630 (refd)
20 *Dhlamini en'n Ander* v *Protea Assurance Co Ltd* 1974 (4) SA 906(A) (refd)
21 *Booysen* v *Shield Insurance Co Ltd* 1980 (3) SA 1211 (SE) (refd)
22 *MBA* v *Southern Insurance Association Ltd* 1981 (1) SA 122 (Tk) (refd)
23 *Miliangos* v *George Frank (Textiles) Ltd* [1976] AC 443; [1975] 3 All ER 801 (refd)
24 *'The Despina R'* [1979] AC 685; [1979] 1 All ER 421 (refd)
25 *Hoffman* v *Sofaer* [1982] 1 WLR 1350 (refd)
26 *Rosita bte Elias* v *Zheng Gui Yuan* 1990 BLD [Sep] 917 (refd)
27 *Gan Put & Ors* v *Ismail bin Hj Mahsin & Anor* 1990 BLD [Nov] 1127 (refd)
28 *Jamaliah bte Mohamad* v *Ng Fook Seng* [1982] 2 MLJ xlviii (refd)
29 *Au Kee Tuang* v *Lightweight Concrete Pte Ltd* [1984] 2 MLJ xxix (refd)
30 *Ong Moh Chong* v *Hitachi Chemical (S) Pte Ltd* [1987] 1 MLJ 450 (refd)
31 *Teo Tio Khiang & Anor* v *Ooi Eng Teong* [1987] 1 MLJ 198 (refd)
32 *Abdullah bin Muhamad* v *Lakhbir Singh* [1988] 1 MLJ xxxiii (refd)
33 *Tan Kok Soon* v *Tan Peng Swee & Anor* [1988] 1 MLJ xxxvi (refd)
34 *Faridah bte Zakaria* v *Chua Teng Lye & Anor* 1989 BLD [Feb] 215 (refd)
35 *Phua Chong Kwee* v *Low Keng Yuen & Anor* 1989 BLD [Sep] 1279 (refd)
36 *Gan Kiam Beng* v *Haji Senan* [1987] 2 MLJ xxi (refd)
37 *Wong Yee Cheong & Anor* v *Toh Seng Chuan* [1988] 2 MLJ xxx (refd)
38 *Lai Chi Kay & Ors* v *Lee Kuo Shin* [1981] 2 MLJ 167 (refd)
39 *Tan Ah Lay* v *Robin Shipbuilders* 1989 BLD [Jan] 87 (refd)
40 *Woo Siong Yen* v *Wong Ko Hien* 1990 BLD [Jan] 549 (refd)

Legislation referred to

Contributory Negligence and Personal Injuries Act (Cap 54, 1989 Ed)
Workmen's Compensation Act (Cap 354, 1985 Ed)

R Karuppan for the plaintiffs.
Lee Yuk Lan for the defendant.

Cur Adv Vult

Yong Pung How CJ: At about 7am in the morning on 20 July 1983, the first plaintiff and Chua Peung Young ('the deceased') were two of the nine passengers travelling to work at the back of their employer's motor pick-up, which was driven by another employee, the defendant, along Jalan Ahmad Ibrahim towards Tuas when the pick-up overturned. The first plaintiff was injured and the deceased was killed.

According to the police investigation officer who arrived at the scene at 8.25am and prepared a sketch plan of the scene, the weather was fine, the stretch of road was straight, the road surface was dry, visibility was clear and, at that time, the traffic flow was moderate. The pick-up was lying overturned on the centre lane of the three-lane highway. There were no brake marks, but there were two scratch marks, both running within the centre lane and leading to the pick-up; the left scratch mark was 11m 40cm, and the right scratch mark was 7m 60cm in length.

The pick-up was inspected by a mechanical engineer at the Traffic Police Division that afternoon. It was

found to be in working condition; it had done about 50,000km, the hand brake and the foot brake systems were in working order, the steering system had no defect and the tyres were in serviceable condition. The damage to the pick-up was listed as front windscreen glass broken; roof badly dented; front bonnet dented; right front signal light broken; right front fender slightly dented; right passenger's door windscreen glass broken; right side iron railing bent; left passenger door slightly dented; left and right front fenders dented; and both rear view mirrors damaged.

The first plaintiff was unable to recall how the accident occurred because he was dozing off at the time; neither were the other passengers who were seated with him at the back of the pick-up. Also, no other persons responded to the police call for witnesses. The plaintiffs were therefore not in a position on their own to discharge the burden of proof placed upon them by providing any specific acts or omissions on the part of the defendant which would qualify as negligent conduct. However, in this case, the mere fact that the accident happened speaks for itself and, in applying the maxim res ipsa loquitur, the court can draw an inference of negligence against the defendant so as to establish a prima facie case against him. In a much quoted passage in the leading case of *Scott* v *St Katherine Docks Co,*[1] Erle CJ said:

> There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

In the present case, the pick-up was at all times under the control and management of the defendant, and the accident which resulted in the pick-up overturning in the middle of the road could not have happened in the ordinary course of things without negligence on the defendant's part. A burden is therefore cast upon the defendant, and he must show how the accident actually occurred, and how this was consistent with due care on his part. In other words, he must rebut the inference of negligence raised against him: *VVV Menon* v *Henri Pigeonneau;*[2] *Halijah* v *Velaitham.*[3]

The defendant gave evidence on his own behalf. He said that he had only been working for the employer for about a week before the accident. He was not employed as a driver, but as a fitter; his employer, Ching Thiam Wah, had been keeping late nights recently and was tired, and so he had also been driving the pick-up, to help out. On the day of the accident, his employer was seated beside him in the front cabin. Although he had said in his police report that the traffic flow was heavy, he said in his evidence in court that it was moderate. Just before the accident, he was travelling in the centre lane, following a taxi, and there was some other traffic in front of the taxi. He was travelling at between 40 and 50 according to the speedometer, but he could not explain whether this was in kilometres or in miles per hour, and he was not sure if his pick-up had a speed limit indicator. As he was on his way to work, he was afraid he might be late. So when he reached the place of the accident, and he saw that there was no traffic behind him in the right lane, he gave right-turn signal and sounded his horn in preparation to overtake the taxi. He then swerved his pick-up into the third lane, in order to accelerate and overtake the taxi. At that same moment, however, without giving any signal, the taxi also swerved to the right and into his path. It was 3 to 4ft from the front of his pick-up. He applied his foot brakes, without jamming on them, but in doing so he became excited, and he did not know what happened, but somehow he lost control of the pick-up. It veered towards the right and hit the kerb. At that point, he lost consciousness. When he came to, he saw that his pick-up had overturned and was lying in the middle of the road. Under cross-examination, he conceded that he could have turned the steering wheel for a brief moment, but he did not really know. But he could not have mounted the kerb on to the road divider, much less hit the lamp-post or a tree on the divider.

Ching Thiam Wah ('Ching'), the employer, gave evidence for the defendant. He was seated in the front cabin of the pick-up, beside the defendant who was driving. He did not appear to have been paying much attention to the passage of the pick-up, however, as he said that he had decided to be relaxed from the moment he boarded the pick-up at the start of the journey. He clarified this to mean that he was alternately opening and closing his eyes as they went along. Just before the accident, however, while still relaxing in this manner, he lit a cigarette, and while doing so he noted that there was a taxi in front of them, and other traffic in front of the taxi. At that time the pick-up was 10 to 12ft behind the taxi. The defendant pulled over to the right lane to overtake the taxi and, when the pick-up was already three-quarters on the right lane and the taxi was only 3 to 4ft in front of it, the taxi suddenly swerved into the path of the pick-up. The defendant thereupon swerved further to the right, but hit the kerb, and the pick-up overturned.

The defence then was that the accident was caused by the driver of an unknown taxi, who suddenly and without warning swerved to the right and cut into the path of the defendant just as the defendant was about to overtake him. In order to avoid a collision with the taxi, the defendant was forced to swerve and apply his brake. But, in spite of this, the defendant was unable to avoid colliding with the road divider. The defence therefore was that the taxi driver was solely, or at least partly, to blame.

The accident occurred in July 1983, almost eight years ago, and it is inevitable that the memories of even the most honest witnesses will have become blurred with the long passage of time. The unreliability of such evidence is greater when the witness is an interested party in the proceedings. In *Mace* v *R & H Green and Silley Weir Ltd & Anor*,[4] Lord Parker CJ had this to say on the subject at p 506:

> This matter arises nearly six years after the event. I am not saying that anybody is particularly to blame but it makes the task of witnesses and of the court extremely difficult. Memories, anyhow, are liable to fail and after six years they are almost bound to fail. Moreover, one is bound to be suspicious of the plaintiff's claim in those circumstances; one approaches the matter on the basis that it may be something that he has gradually in the course of time conjured up, and one is bound to look at his evidence with great suspicion. Again, from the point of view of the court, it is often impossible in these circumstances to accept the whole of the evidence of any one witness, however honest he is and however much he may be trying to tell the truth. Six years after the event witnesses may with the best will in the world be at fault.

As the evidence unfolded in the present case, I had the greatest difficulty in believing the defendant and his employer, Ching, and in accepting their version of what happened. The employer had at least the excuse that he was dozing half the time, but there was no reason why the defendant should not have been able to explain more clearly what happened. Although he was quite articulate, he avoided direct answers to many questions and I formed the impression that the gaps in his account of the accident were due as much to his not having thought out the detailed answers to possible questions in advance, as to the failure of his memory from the passage of time. I therefore did not accept their version of how the accident happened.

There may well have been a taxi in front of the defendant's pick-up at some time that morning: indeed, there was other traffic at the time, but in my opinion none of them contributed to the accident. It was put to the defendant in cross-examination that he had been overtaking other vehicles left and right, which he denied. By his own admission, however, he was already travelling at a good speed, but he was afraid that they might all be late for work, and he was therefore not averse to overtaking other vehicles in front of him. Even if there had been a taxi which swerved in front of him and caused the accident in the way that he alleged, he was clearly driving much too closely behind it, when he started his move to overtake it. He should have been a good three car lengths behind the taxi when he pulled over to the right: See *The Highway Code*, paras 60 and 67. Even at 40 to 50 km/h, he was already travelling at 37 to 46 ft/s, and a collision would have been unavoidable.

In my judgment, however, there was no taxi involved, and for some reason which has not been explained by him, the defendant lost control of the pick-up at that point, as a result of which the pick-up overturned and skidded along the road. He had only been employed by the employer for about a week before the accident, as a fitter and not as a driver, and he was only standing in as a driver that fateful morning. It would be fair to draw the inference that he was not entirely familiar with the pick-up which he was driving. Accordingly I found that the defendant failed to discharge the burden placed on him, and was solely to blame for the accident.

The first plaintiff survived the accident, but was severely injured. First, his fourth, fifth and sixth ribs were fractured causing a right haemothorax. A chest tube which was immediately inserted on admission to hospital removed a large quantity of blood; it was removed only eight days later. Secondly, the neck of the right scapula was fractured. Thirdly, he sustained a major injury to the right brachial plexus causing total paralysis of his right upper limb. The accident occurred on 20 July 1983. On 9 March 1990, which was the last occasion on which he was medically examined before the hearing of this suit, the medical report showed that the fractures had united and he had no more problem with his chest; but the right brachial plexus injury remained a problem, because there had been no sign of any recovery and by then it could be confirmed that there would never be any recovery. The relevant part of the report of Dr WN Cheng, the orthopaedic surgeon, dated 26 March 1990 was as follows:

> The muscles of the right upper limb were wasted from shoulder down to fingers. There was no trophic ulcer anywhere on the skin of his right upper limb.
>
> He was able to bend (flex) his right elbow from 0° to 100°. While doing this his right elbow was pulled next to the body and his right forearm supinated turning his palm to face upwards.
>
> The fingers of the right hand including the right thumb and the wrist were completely paralysed. There was not even a flicker of movement. The right elbow was able to flex as described above. The right shoulder was also completely paralysed. Some rotational movements were seen in the scapular.
>
> There was complete sensory loss of the upper limb from shoulder down to the fingers.

What the main injury amounted to in simple terms, as Dr Cheng explained in giving evidence, was that the first plaintiff's right arm was now functionally useless, all the nerves serving it having been injured, and it could just as well be amputated: it need not be, if he was prepared to live with a useless arm, but even so the arm would wither away.

The first plaintiff is a Malaysian, who was born in 1960. According to him, he went to school in Malaysia in the Malay medium up to Form 2, and did not learn any English. He started working in 1976 at the age of 16 in Butterworth, frying coffee beans for two years. In 1978, he came to Singapore to work as a shop-assistant, because the wages in Singapore were about 50% higher than those in Malaysia. After about two years, he became a fitter and welder in a shipyard. He did not find the job in that shipyard to his liking, however, as he had to climb to a height to do his welding. So he left that job and went over to his new employer, Ching, a few days before the accident. At the new place of work, he was also employed as a fitter and welder, but now the welding was done in a workshop on the ground. His agreed wages with Ching were $30 per day with overtime pay of $5 per hour. On the three or four days working for Ching before the accident, he did overtime work, which made his total earnings about $40 per day. Ching had not got a work permit for him yet, as he had only worked a few days, but he expected that Ching would do so soon.

After his discharge from hospital, he was unable to work as he could not move around. After about a year, as his arm was not improving, he went back to Malaysia to see if he could get his arm treated. In Malaysia, he also could not find work. He used to be right-handed, but his right arm was now useless. He sought employment with goldsmiths and textile merchants, without success. About two years ago, he started working for his sister in her optical shop because he could not find any other work. It was a small shop which sold only frames and lenses, and with only two other employees who cut lenses and fixed them to frames. He helped his sister to look after the shop, showing frames to customers, looking after cash and so on. The other two employees were paid M$600 and M$400 respectively per month. His sister paid him M$300 per month, but she allowed him to stay above the shop, and also gave him his two meals a day.

In *British Transport Commission* v *Gourley*[5] at p 197, Earl Jowitt said: 'The broad general principle which should govern the assessment of damages in cases such as this is that the tribunal should award the injured party such a sum of money as will put him in the same position as he would have been in if he had not sustained injuries.' So far as physical injuries are concerned, legal precedents establish a cynical but reasonably standard tariff for injuries to different bones and limbs; but the assessment of loss of earnings is dependent on a plaintiff's circumstances and more often than not extends into what is no more than speculation. In the present case, the speculative possibilities were increased because, in the course of hearing, the question of illegality and its possible impact on either the liability of the defendant or the quantum of damages was raised, as the first plaintiff did not have a valid work permit at the time of the accident. As a rule of public policy, the maxim *ex turpi causa non oritur actio* (no cause of action arises out of a base cause) will apply in the law of contract to prevent a plaintiff founding a claim on an illegal act or agreement. It is clear, however, that the maxim has only very limited application in tort and, in general, the fact that the plaintiff is involved in some wrongdoing does not of itself provide the defendant with a good defence: *Henwood* v *Municipal Tramway Trust (SA)*;[6] *National Coal Board* v *England*;[7] *Progress and Properties Ltd* v *Craft*;[8] *Jackson* v *Harrison*.[9] The only exceptions would appear to be the limited range of cases in which, on the facts of the case, an injury can be held to have been directly incurred in the course of the commission of a crime: *Godbolt* v *Fittock*;[10] *Smith* v *Jenkins*;[11] *Ashton* v *Turner*;[12] *Pitts* v *Hunt & Anor*.[13] These decisions would also be in line with the public policy in Singapore which is reflected in the Contributory Negligence and Personal Injuries Act (Cap 54, 1989 Ed) under which a claim will not be defeated by reason of the fault of the person suffering the damage; and in the Workmen's Compensation Act (Cap 354, 1985 Ed) which provides that a workman will not be prevented from suing for recovery of compensation even under an illegal contract.

While, therefore, the first plaintiff would not be precluded from claiming against the defendant in this case in spite of his being on his way to work without having a work permit at the time of the accident, the question has to be considered again from the point of view of the quantum of damages to which he is entitled, and in particular, whether and to what extent his illegal earnings in Singapore at the time of the accident might be used as a basis for calculating his pre-trial loss of earnings and his future loss of earnings. As to the effect of illegality on the quantum of damages to be awarded, the case law in Singapore and Malaysia is scanty and not entirely clear. In *Kang Bark Teng & Anor* v *Lee Kwee Lim & Anor*,[14] an unlicensed pork seller was killed in a motor accident. Rogers J in the Singapore High Court, apparently without the benefit of argument or case law on the point, found the deceased's position to be one of uncertainty, but, as the deceased had been earning $300 per month for some time, he ignored the illegality and fixed the damages for the dependents on that basis. In *Tan Chooi Thin & Anor* v *Teo Whee Hong*,[15] the deceased was a member of the crew of a motor junk and was alleged to be deriving some extra-curricular income from the illegal business of trading in precious stones in violation of customs legislation. Although there was no evidence, Buhagiar J in the Penang High Court observed obiter that, even if there was reliable evidence as to its nature, he did not think that the profits made

from that business could be excluded in reckoning the deceased's earnings. In *Yaakub Foong* v *Lai Mun Keong & Ors*,[16] the plaintiff who was a Malaysian citizen was run down in Johore Bahru. Liability was admitted and the only dispute was on the quantum of the plaintiff's earnings. The plaintiff claimed that he worked in Singapore, and admitted that he did not pay any income tax and even performed additional work in contravention of his work permit. Shankar J was of the view that, if there had been cogent evidence as to the precise amount of the tax payable by the plaintiff and of the amount which he had illegally earned in contravention of his work permit, he would have discounted the damages arithmetically due to the plaintiff on both counts.

Rogers J in *Kang Bark Teng*'s case,[14] Buhagiar J in *Tan Chooi Thin*'s case[15] and Shankar J in *Yaakub Foong*'s case[16] have all accepted that notwithstanding illegality the plaintiff would not start from a hopeless position: by varying degrees they have all accepted that damages would be awarded even though the damages might be discounted for the *turpi causa*. Presumably, in assessing lost earnings on this basis, the court would have to take into consideration the probability and the length of time that those earnings could have continued, based on the plaintiff's evidence that he would have continued in that occupation; that being in those cases in which illegality was capable of being legitimized he would have endeavoured to rectify the situation. The burden of proving all this must necessarily rest in each case on the plaintiff.

Miss Lee Yuk Lan, counsel for the defendant, drew my attention, however, to several cases from other common law jurisdictions in which the question of damages for loss of earnings derived from illegal employment or activity has been considered. In the Australian case of *Meadows* v *Ferguson*,[17] the plaintiff sued the defendant for damages and loss suffered by him while he was a passenger in a car driven by her which ran off the road and came into collision with an electric light pole. For some ten months before the accident, the plaintiff had been employed as clerk to a bookmaker, and, but for the accident, he intended to continue working in this profession. The loss of earnings during his 12 weeks' incapacity were those which he would have received for aiding and abetting the bookmaker in his business which plainly was unlawful. As the earnings would have been derived from an illegal employment or activity, the court held that on grounds of public policy it should not recognize those earnings as affording a proper basis for the award of damages.

In *Burns* v *Edman*,[18] the deceased was killed in a motor accident and his wife sued under the Law Reform (Miscellaneous Provisions) Act 1934 and the Fatal Accidents Acts 1846-1959. The evidence showed that he derived his income, to his wife's knowledge, solely from the proceeds of crime. Crichton J decided that, because she had known, or had not succeeded in establishing that she did not know, that such money as the deceased gave her was from the proceeds of crime, she was not entitled to claim damages as his personal representative under the Law Reform (Miscellaneous Provisions) Act 1934 on the basis that *ex turpi causa non oritur actio* applied. Under the Fatal Accidents Acts, she was claiming as a dependant and not standing in the shoes of the deceased. Nevertheless Crichton J also refused damages under the Fatal Accidents Acts on the same basis. He thought that *LeBagge* v *Buses Ltd*[19] in which the New Zealand Court of Appeal held that the fact, that the deceased had earned a small proportion of his income by infringing certain regulations relevant to his trade as a milk float driver was of minimal importance, was wholly distinguishable, because in *Burns* v *Edman*[18] the whole support given to the dependant flowed directly from criminal offence. He decided that on the facts and circumstances before him, the possibility that the support that the deceased might have provided in the future might not have been from criminal activities was entirely speculative and unproven to the point of impossibility, and damages could not be awarded for speculative possibilities.

In the South African case of *Dhlamini en'n Ander* v *Protea Assurance Co Ltd*,[20] the plaintiff who was injured in a motor collision had, for some 20 years before her injury, been earning money from selling fruit as a hawker without a licence, and with the knowledge that a licence was required and that her licence had on a number of occasions been refused despite the assistance of an attorney. The damages that she claimed was for income that she would have earned illegally, but was prevented from earning. The appellate court of five judges, headed by Chief Justice Rumpff, quoted with approval from the decision in *Meadows* v *Ferguson*[17] and held that because of public policy the plaintiff could not claim damages for income lost while she did not have a licence to be a hawker. The principles laid down in *Dhlamini*'s case[20] were applied and extended in two other South African cases: *Booysen* v *Shield Insurance Co Ltd*[21] and *MBA* v *Southern Insurance Association Ltd.*[22]

In my judgment, the assessment of the first plaintiff's loss of earnings should be based on an estimate, however difficult and imprecise this might be, of what he would have earned in Malaysia had there been no accident to him. The immigration laws and regulations which require work permits to be obtained by foreign workers before they can work in Singapore were not designed merely to raise a little extra revenue, but to implement a basic public policy. To compensate the first plaintiff on the basis of what he might have earned

by working illegally in Singapore without a valid work permit would be against public policy and wholly improper. Apart from the first plaintiff's statement in his evidence that he expected Ching to get a work permit for him soon, there was no evidence whatsoever that an application for a work permit had been or would be made, or, indeed, that an application would necessarily be successful, if made. An examination of his passport showed that, although he made numerous visits to Singapore from 1978 to 1983, he had only been issued with a work permit for two successive three-month periods in 1980 and on all other occasions was in Singapore only on a social visit pass which prohibited employment. It would appear that he had no work permit even in his most recent job as a fitter and welder in another shipyard which he left for Ching only a few days before the accident.

In assessing what he would have earned in Malaysia had there been no accident to him, the court has to take a pragmatic approach to the problem. I have in this case discarded the pay and the other support given to him by his sister, as they appear to me to be in the nature of support by the family rather than wages in an arms-length employment which can serve as a reliable guide. Having regard to the unchallenged evidence that wages in Singapore were about 50% higher than those in Malaysia, the fact that he had little education, and the amount of wages paid by his sister to other workers in her shop, I have awarded him S$300 per month (as the Singapore dollar equivalent of the wages which he would have earned in Malaysia) for the whole of the period of about 94 months between the accident and judgment. Similarly, in calculating his future loss of earnings, I have taken the same figure of S$300 as the multiplicand and, having regard to his age, applied a multiplier of 15 years. I am aware that in such cases the court has a discretion to award the damages in a foreign currency if this is the currency which best expresses the plaintiff's loss: *Miliangos* v *George Frank (Textiles) Ltd*;[23] *The Despina R*;[24] *Hoffman* v *Sofaer*.[25] However, as the damages are being awarded for a tort committed in Singapore and the Malaysian currency has been used only as a means of calculation, I have refrained from departing from the usual practice of the court and have continued to express the damages awarded in Singapore dollars.

Award to the first plaintiff

General damages for pain and suffering and loss of amenities:

	$
(a) fourth, fifth and sixth ribs fractured with haemothorax	7,000
(b) fractured scapula	4,000
(c) right brachial plexus injury causing total paralysis of right upper limb, and scars	50,000
(d) interest on $61,000 at 6% pa from date of writ to date of judgment	

Special damages

(e) medical bills and transport expenses (agreed)		3,950
(f) pretrial loss of earnings @ $300 per month	=	28,300
(g) Future loss of earnings (multiplicand $300 per month × 15 years)	=	54,000
(h) interest on special damages of $3,950 at 6% pa from date of writ to date of judgment, and on $28,300 at 3% pa from date of accident to date of judgment		

(Cases referred to: by plaintiff, for (a) *Rosita bte Elias* v *Zheng Gui Yuan*;[26] for (b) *Gan Put & Ors* v *Ismail bin Hj Mahsin & Anor*;[27] for (c) *Jamaliah bte Mohamad* v *Ng Fook Seng*;[28] for (f) *Au Kee Tuang* v *Lightweight Concrete Pte Ltd*;[29] *Ong Moh Chong* v *Hitachi Chemical (S) Pte Ltd*;[30] *Teo Tio Khiang & Anor* v *Ooi Eng Teong*;[31] by defendant, for (a) *Abdullah bin Muhamad* v *Lakhbir Singh*;[32] *Tan Kok Soon* v *Tan Peng Swee & Anor*;[33] *Faridah bte Zakaria* v *Chua Teng Lye & Anor*;[34] for (b) *Phua Chong Kwee* v *Low Keng Yuen & Anor*;[35] for (c) *Gan Kiam Beng* v *Haji Senan*;[36] *Wong Yee Cheong & Anor* v *Toh Seng Chuan*;[37] for (f) *Lai Chi Kay & Ors* v *Lee Kuo Shin*;[38] *Tan Ah Lay* v *Robin Shipbuilders*;[39] *Woo Siong Yen* v *Wong Ko Hien*.[40])

The second plaintiffs were the administratrix and co-administratrix of the deceased. One of them, Ong Yan Ten, was the widow. She was 32 when he died, leaving her three children: a son born on 5 June 1974 who was in Primary Three at the time of the accident and is now in junior college; a second son born on 6 January 1977 who was then in a kindergarten and is now in Secondary Two; and a daughter born on 13 September 1979 who is now in Primary Six. Before her marriage, she had worked in a garment factory. She stopped working after her marriage, because of the children, and the family was entirely dependent on the deceased. She was now a baby sitter, earning $470 per month. She and her children live with her mother, who provided them with free accommodation and meals, but she was responsible for the children's other expenses which came to slightly more than $400 per month.

Before the deceased worked for his present employer, Ching, he had been a foreman with a motor repair company, and then with a cable company. Because of the lapse of time, she could not remember what he earned in these earlier employments, or what he gave her. At the time of his death, he was earning a basic wage of $30 per day in Ching's shipyard; but he also earned some considerable overtime pay, although she was not sure how much overtime he did or what the rate

of overtime pay was. He was also working part-time as a hawker's assistant for which he was paid $10 per day; the arrangement with the hawker was flexible in that he could turn up later if he had to work overtime at the shipyard. Out of his earnings, the deceased was giving her $800 per month at the time of his death. The amount had been increasing over the years and was sufficient for the needs of the family. At that time, her expenses were more than $700 per month; this figure included about $450 per month for food for the family, and she gave the court a breakdown of various other items of expenditure which, together with food, explained the figure of more than $700 per month. Some four years ago she started living with her mother. This was obviously a great help, but she was afraid that when her younger brother got married, she would not be able to continue to live with her mother any longer.

The evidence of the deceased's part-time employment as a hawker's assistant was broadly corroborated by the hawker, Ng Thai Cheng, who employed the deceased. He had a stall in the Boon Lay Hawker Centre, and had occasion to employ the deceased from November 1982 up to the time of his death in July 1983. He employed three assistants to help him at night, and the deceased was the second assistant. Although there was always work to be done at the stall, the deceased did not come to work every night but probably 20 to 22 times per month. On the nights that he came, the deceased would join him at his stall at about 7pm. He paid the deceased $10 for each time that he worked. He did not have to pay Central Provident Fund contributions. He also did not have a licence to employ his part-time workers, because the regulations in those days did not require this.

The agreed bundle of documents included the comptroller's assessments of the deceased's income for the years of assessment 1983 and 1984 which were issued after his death to the personal representatives, in this case the second plaintiffs. These assessments showed that in 1982 the deceased had a total assessable income of $13,441 as a sub-contractor; and that in 1983 (presumably for the period up to 20 July 1983 when he was killed) his income from employment was $6,775. The assets schedule under s 38(2) of the Estate Duty Act (Cap 137, 1985 Ed) attached to the grant of letters of administration to the second plaintiffs also included particulars of an HDB flat and showed that he had a Central Provident Fund account of $14,973.18. Although such evidence cannot be taken too far without further clarification, they lend some credibility to the evidence of the widow of the amounts she was receiving from him. I have discarded the possibility that the widow might remarry, not only because it is about eight years since the deceased died and she has not remarried, but also because as a general observation the remarriage of Asian widows is a rare occurrence.

Award to the second plaintiffs

	Estate	$
(a)	Loss of expectation of life (agreed)	7,000
(b)	Future loss of earnings ($1,000 per month × 14 @ 40%)	67,200
(c)	Interest on $7,000 at 6% pa from date of writ to date of judgment	
	Dependency	
(a)	Pre-trial loss @ $750 per month	70,750
(b)	Future loss of support ($900 per month × 7 years)	75,600
(c)	CPF benefit	15,000
(d)	Interest on pre-trial loss and CPF benefit of $85,750 at 3% pa from date of accident to date of judgment	
	Special damages	
(e)	Funeral expenses (agreed)	4,000
(f)	Interest on special damages of $4,000 at 6% pa from date of writ to date of judgment	

The first and second plaintiffs will also have their costs.

Claims allowed.

Solicitors: *Murphy & Dunbar; Goh Poh & Partners.*

Reported by *Mathavan Devadas*